

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

FRED S. SILVERMAN  
JUDGE

NEW CASTLE COUNTY COURTHOUSE  
500 North King Street, Suite 10400  
Wilmington, DE 19801-3733  
Telephone (302) 255-0669

January 21, 2010

**(VIA E-FILED)**

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RE: *ConAgra Foods, Inc. v. Lexington Insurance Co.*  
C.A. No. 09C-02-170 FSS

Dear Counsel:

This case involves an insurance coverage dispute. On October 30, 2009, the court issued its decision on Lexington's and ConAgra's cross motions for partial summary judgment. The court held that: the "Lot or Batch" provision of the Lexington insurance policy applies to the peanut butter claims; the provision requires exhaustion of the \$5,000,000 retained limit for each lot or batch of peanut butter; after seven days of production, for insurance purposes, a new lot or batch begins; Lexington does not have a duty to defend until ConAgra shows the self-insured retention has been exhausted; and that issues of fact are present that preclude summary judgment on the bad faith claim.

Lexington filed this motion for reargument on November 6, 2009. "On

John E. James, Esquire  
Denise Seastone Kraft, Esquire  
*ConAgra Foods, Inc. v. Lexington Insurance Co.*  
*C.A. No. 09C-02-170 FSS*  
Letter  
January 21, 2010  
Page 2

a motion for reargument the only issue is whether the court overlooked something that would have changed the outcome of the underlying decision.”<sup>1</sup>

Lexington contends that “this Court’s rulings with respect to the merits of the Policy defenses . . . now require the dismissal of ConAgra’s bad faith claim as a matter of law.” Relying on *Casson v. Nationwide Insurance Co.*,<sup>2</sup> and *Lewis v. American Independent Insurance Co.*,<sup>3</sup> Lexington claims that “this Court’s rulings with regard to Lexington’s policy defenses establish as a matter of law that Lexington did have ‘reasonable grounds for relying upon its defense to liability.’”

ConAgra responds that Lexington committed to defend ConAgra, but then waited approximately two years before denying coverage. In other words, for two years, Lexington gave the impression that it would defend ConAgra, then unexpectedly changed its position. ConAgra also claims that “immediately after receiving ConAgra’s notice, Lexington required ConAgra to cooperate with Lexington in defense of the claims[,]” and that Lexington “delayed approximately nine months before even preliminarily purporting to reserve its rights[.]” ConAgra argues that “[t]hese acts establish that Lexington did not thoroughly investigate or process ConAgra’s coverage claims for an extended period of time[.]” and “raise a question of whether Lexington acted in bad faith when it misled ConAgra regarding its intent to cover the Peanut Butter Claims.”

“Under Delaware law, a bad faith insurance claim ‘sounds in contract and arises from the implied covenant of good faith and fair dealing.’”<sup>4</sup> “A bad faith breach of insurance claim requires the insurer to have failed in bad faith to investigate

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<sup>1</sup>*McElroy v. Shell Petroleum, Inc.*, 1992 WL 397468, at \*1 (Del. Supr. Nov. 24, 1992).

<sup>2</sup>455 A.2d 361 (Del. Super. 1982).

<sup>3</sup>2004 WL 1426964 (Del. Super. June 22, 2004).

<sup>4</sup>*Homsey v. Vigilant Ins. Co.*, 496 F. Supp. 2d 433, 437 (D. Del. 2007); *see also Lewis*, 2004 WL 1426964, at \*10.

John E. James, Esquire  
Denise Seastone Kraft, Esquire  
*ConAgra Foods, Inc. v. Lexington Insurance Co.*  
*C.A. No. 09C-02-170 FSS*  
Letter  
January 21, 2010  
Page 3

or process the claim or to have delayed in its payment obligation.”<sup>5</sup> “[T]o establish ‘bad-faith’ the plaintiff must show that the insurer’s refusal to honor its contractual obligation was clearly without any reasonable justification.”<sup>6</sup>

The court agrees with Lexington that it owes no duty to defend ConAgra until ConAgra reaches the applicable \$5,000,000 self-insured retentions. If Lexington originally took this position, ConAgra likely would not be able to demonstrate bad faith. It is different, however, if, as ConAgra claims, Lexington mislead ConAgra into believing it would defend ConAgra, and ConAgra suffered harm because it relied on Lexington.

It must be kept in mind that this is reargument on a motion for summary judgment. At this point, Lexington has not been found to have acted in bad faith. The court has merely concluded that, viewing the evidence in the light most favorable to ConAgra, there is a genuine issue of material fact as to whether Lexington failed in bad faith to investigate or process the claims.<sup>7</sup> It also remains to be seen what damages ConAgra can prove, as the complaint is bare-bones as to that.

Accordingly, Lexington’s motion for reargument is **DENIED**.

**IT IS SO ORDERED.**

Very Truly Yours,

/s/ Fred S. Silverman

cc: Prothonotary (civil)

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<sup>5</sup>*Homsey*, 496 F. Supp. 2d at 437; *see also McDuffy v. Koval*, 226 F. Supp. 2d 541, 546-47 (D. Del. 2002).

<sup>6</sup>*Casson*, 455 A.2d at 369.

<sup>7</sup>*See* Super. Ct. Civ. R. 56(c).